Falcon Trucking, LLC and Ragle, Inc., a single employer and/or joint employers *and* Chauffeurs, Teamsters and Helpers, Local Union No. 215 a/w International Brotherhood of Teamsters. Cases 25–CA–132518, 25–CA–135316, 25–CA–135335, and 25–CA–159531

July 30, 2018

ORDER DENYING MOTION[1]

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

Upon charges filed by Chauffeurs, Teamsters and Helpers, Local Union No. 215 a/w International Brotherhood of Teamsters (Union) in Cases 25–CA–132518, 25–CA–135316, 25–CA–135335, and 25–CA–159531, the General Counsel issued a consolidated complaint on January 28, 2016, against Falcon Trucking, LLC (Falcon) and Ragle, Inc. (Ragle) as a single employer and/or joint employers (collectively, the Respondents).[2] The consolidated complaint alleged that the Respondents had violated Section 8(a)(5), (3), and (1) of the Act. The Respondents filed an answer denying all the unfair labor practice allegations.

On April 15, 2016, the Respondents and the Union entered into an informal settlement agreement resolving all allegations in the consolidated complaint. The Regional Director for Region 25 approved the agreement on April 19, 2016. As pertinent here, the Respondents agreed that they would not refuse to bargain in good faith with the Union or refuse to assign work to employees because of their union membership. The Respondents also agreed not to subcontract bargaining-unit work, change the way they assigned work to unit employees, reduce the number of unit employees, remove or transfer bargaining-unit work, or close portions of their trucking operations without prior bargaining with the Union.

In addition, the Respondents affirmatively committed to "resume [Falcon]'s operations and assignment practices for the work previously performed by [Falcon] employees represented by [the Union] in order to restore [Falcon] as it existed prior to July 8, 2014."[3] The Respondents also agreed to reinstate bargaining-unit driver Daniel J. Mabrey to his former position with Falcon. Mabrey was one of five Falcon unit drivers who received backpay under the terms of the settlement; the other four declined reinstatement and remained at their then-current jobs.

The settlement agreement contained the following default provision:

> The Charged Parties agree that in case of noncompliance with any of the terms of this Settlement Agreement by either of the Charged Parties, and after 14 days [sic] notice from the Regional Director of the National Labor Relations Board of such noncompliance without remedy by either of the Charged Parties, the Regional Director will reissue the Consolidated Complaint previously issued on January 28, 2016, in the instant case(s). Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the Consolidated Complaint. The Charged Parties understand and agree that the allegations of the aforementioned consolidated complaint will be deemed admitted and their respective Answers to such consolidated complaint will be considered withdrawn. The only issue that may be raised before the Board is whether either of the Charged Parties defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the consolidated complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Parties on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte, after service or attempted service upon Charged Parties/Respondents at the last address provided to the General Counsel.

On November 10, 2016, the Union filed a charge in Case 25–CA–188022 alleging that the Respondents had breached the settlement agreement by contracting out Falcon's bargaining-unit work. In an email dated December 9, 2016, the Region requested that the Respondents produce documents relevant to their compliance. On December 15, 2016, the Respondents provided responsive documents. Additionally, the Respondents submitted a position statement in which they denied any violations of the Act or the settlement agreement and asserted that Ragle's obligations to subcontract to Minority-Owned Business Enterprises (MBEs) and Women-

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The General Counsel had previously issued a complaint on June 30, 2015, in Cases 25–CA–132518, 25–CA–135316, and 25–CA–135335 that included many of the same allegations.

[3] July 8, 2014, was the date that the Union was certified as the bargaining representative of Falcon's employees.

Owned Business Enterprises (WBEs) had restricted the amount of work it could assign to Falcon.

In a letter dated March 14, 2017, the Region advised the Respondents that it had found merit in the Union's allegations that they had breached the settlement agreement by not restoring Falcon's operations "as they existed prior to July 8, 2014." The Region added that the letter would serve as the required 14-day notice that the Respondents were not in compliance with the settlement agreement and that, if they did not remedy the noncompliance within 14 days, the Region would reissue the original consolidated complaint and move for a default judgment.

In a subsequent email, the Region explained that, because Falcon had employed three to five drivers in 2013 and 2014 and five drivers as of the Union's June 27, 2014 election, and had performed 54% of Ragle's trucking work in 2013, compliance with the settlement required that Falcon employ more than two drivers and fulfill "about 50% of Ragle's trucking needs." The Region also asserted that the Respondents' obligations to MBEs, WBEs, and Disadvantaged Business Enterprises (DBEs) did not justify the failure to use Falcon because the Respondents had used R&J Trucking, which is not an MBE, for much of the work and also had "use[d] MBE[s] at a much higher % than what is contractually required."

On March 28, 2017, the Respondents sent Region 25 a letter denying that they had violated the settlement agreement. The letter indicated that both before and after the settlement, Ragle only had used Falcon for tri-axle hauling work within a 1-hour drive of its Newburgh, Indiana facility. The amount of that work varied significantly from year to year, ranging from $1,156,562 in 2014 to $521,737.45 in 2016. The Respondents disputed the Region's contention that they had used MBEs, WBEs, and DBEs more than was contractually required, stating that "Ragle needs every bit of work by DBE, WBE or MBE trucking firms that it can get in order to meet its contractually required goals." The Respondents also explained that they had used R&J Trucking because it had the ability to provide five to eight trucks on a daily basis, whereas Falcon was not able to meet this need because it had only one driver.

On May 31, 2017, the Regional Director filed a "Complaint Based On Breach Of Affirmative Provisions Of Settlement Agreement," which asserted that the Respondents had breached the settlement agreement and reiterated the allegations in the January 28, 2016 consolidated complaint. On June 2, 2017, the General Counsel filed a motion to transfer the case to the Board and for a default judgment. The motion stated that the Respondents had breached the settlement agreement "with respect to restoring operations at [Falcon] as they existed prior to July 8, 2014." Specifically, the motion alleged that, since entering into the settlement agreement, the Respondents have "only employed the one driver, and Respondents have continued to subcontract work previously performed by unit members and have continued to transfer unit work to Respondent Ragle."

By order dated June 6, 2017, the case was transferred to the Board, and the Respondents were directed to show cause why the default motion should not be granted. The Respondents filed an opposition on June 9, 2017, contending that default judgment was unwarranted because there were genuine issues of material fact regarding whether they had breached the settlement agreement. Specifically, the Respondents contended that their obligation to restore Falcon "as it existed prior to July 8, 2014" did not require them to employ a particular number of drivers or to do a certain minimum percentage of Ragle's trucking work. Rather, the Respondents argued, their obligation to restore Falcon's operations depended on the amount and type of construction work available to Ragle, the need for tri-axle trucking work on those projects, and Ragle's MBE, DBE, and WBE obligations. Given those factors, the Respondents argued, there were genuine issues of material fact concerning whether Falcon's activity level declined despite the Respondents' legitimate efforts to resume their pre-July 8, 2014 "operations and assignment practices."[4]

The General Counsel submitted a brief in support of his default motion on June 20, 2017. According to the General Counsel, the settlement agreement resolved allegations that the Respondents had unlawfully refused to assign work to Falcon employees and instead had contracted with other entities, and the Respondents' undisputed post-settlement assignment of work to only one Falcon employee while continuing to assign all other trucking work to outside entities demonstrated that they had not complied with the settlement provision requiring them to restore Falcon as it existed prior to July 8, 2014. The General Counsel asserts that the Respondents had fluctuations in business and contracts with DBE requirements prior to July 8, 2014, when Falcon had five unit employees, whereas Falcon has employed only one driver after the settlement. In addition, the General Counsel denies that the Respondents' settlement obliga-

[4] The Respondents also contended that the General Counsel's own internal casehandling procedures precluded him from moving for default without first issuing a complaint on the Union's most recent unfair labor practice charge and combining that case with the charges covered by the settlement agreement. We need not address this argument at this time in light of our disposition of this matter.

tions are limited by its practice of only using Falcon for work within a 1-hour radius of Newburgh, Indiana.

The Respondents' reply brief reiterates their contention that Falcon's workload and the number of drivers it employed was "wholly dependent on the number and kind of construction projects that were available from year to year," and that the settlement agreement obligation to restore operations at Falcon as they existed "prior to July 8, 2014" accordingly did not establish any requirement that it assign any specific percentage of work to Falcon employees or for Falcon to employ more than one employee. The Respondents further assert that the settlement agreement's requirement that Falcon reinstate employee Mabrey, "connected to Falcon resuming operations and assignment practices as they existed prior to July 8, 2014, made clear that Falcon did not have to employ or offer a job to anyone other than Mabrey."

Ruling on Motion for Default Judgment

To warrant a default judgment, the General Counsel, as the moving party, has the burden of establishing that there are no genuine issues of material fact regarding whether the Respondents violated the settlement agreement. See, e.g., *ThyssenKrupp Stainless USA, LLC*, 362 NLRB No. 71, slip op. at 2 (2015) (denying default judgment motion where genuine issues of material fact existed as to whether settlement agreement had been breached); *Vocell Bus Co.*, 357 NLRB 1730, 1731 (2011) (denying default/summary judgment motion given factual dispute about non-compliance with settlement). Contrary to the General Counsel's arguments, the Respondents are not obliged, at this juncture, to present sufficient exculpatory evidence to avoid the entry of a default judgment. Rather, as discussed above, it is the General Counsel's burden to demonstrate that there are no genuine issues of material fact. For the reasons that follow, we find that the General Counsel has not done so here.

The pertinent portion of the settlement agreement obligated the Respondents to reinstate Mabrey and to "resume [Falcon]'s operations and assignment practices for the work previously performed by [Falcon] employees represented by [the Union] in order to restore [Falcon] as it existed prior to July 8, 2014." Contrary to the Respondents' suggestion, the obligation to restore Falcon as it existed prior to July 8, 2014 was not satisfied by its reinstatement of Mabrey. Instead, the settlement requires, in addition, that the Respondents restore Falcon's operations and assignment practices to those prevailing prior to that date. Contrary to the General Counsel's suggestion, the settlement does not require the Respondents to assign any specific quantity of work to Falcon (including any specific percentage of the work performed by Ragle) or that Falcon employ a specific number of unit employees. It only requires the Respondents to restore the prior operations and assignment practices.

Accordingly, we cannot determine whether the Respondents have failed to comply with the settlement agreement without first identifying the operations and assignment practices that prevailed before July 8, 2014, and then determining whether the Respondents have failed to restore them. The General Counsel has failed to establish that there are no genuine issues of material fact as to these issues.[5] The Respondents contend that their pre-July 2014 practice was to assign to Falcon only tri-axle dump truck work within a 1-hour drive from its Newburgh, Indiana facility that was not required to be assigned to MBE, DBE, and WBE firms. The General Counsel denies these contentions. The parties further dispute whether all of the Respondents' MBE, DBE, and WBE assignments during the relevant period were contractually required, and whether fluctuations in Ragle's business needs justify any of the changes in the volume of work assigned to Falcon after July 2014. We find that a hearing is required in order to resolve these disputed factual issues.[6]

ORDER

For the foregoing reasons, it is ordered that the General Counsel's motion for a default judgment is denied.

It is further ordered that this proceeding is remanded to the Regional Director for Region 25 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge, limiting such proceeding to determining whether the complaint should be dismissed on the ground that the Respondents complied with the terms of the settlement agreement relating to resuming Falcon's operations and assignment practices for the work previously performed by Falcon employees

[5] The General Counsel appears to suggest that the Respondents must have breached the settlement because they contracted 54% of Ragle's trucking work to Falcon in 2013 but have contracted less of that work to Falcon since entering into the settlement agreement. According to the Respondents, however, Ragle, Falcon's parent, is a multi-state heavy and highway general contractor with a wide variety of trucking needs that has never relied solely (or even largely) on Falcon for its trucking work. For these reasons, in addition to those discussed above, we find that the apparent decrease in the percentage of work contracted by Ragle to Falcon, alone, is insufficient to establish that there are no genuine issues of material fact here.

[6] We recognize that, as the General Counsel stresses, the Respondents have taken the erroneous position that the settlement agreement did not require them to employ or offer a job to anyone other than Mabrey. However, on this record we cannot rule out the possibility that, even under a correct understanding of its obligations, Falcon would not have hired any additional drivers for the reasons stated above, i.e., that the Respondents' misperception of their obligations was akin to a harmless error. Accordingly, the Respondents' misstatements about the requirements imposed by the settlement are insufficient to warrant the entry of default judgment.

represented by the Union in order to restore Falcon as it existed prior to July 8, 2014.

Dated, Washington, D.C. July 30, 2018

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD